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No.

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IN THE
Supreme Court of the United States

TARKWIN ENRICK, PETITIONER

v.

KEVIN M. KORCZAK AND PHILIP J. SCHMIDT, as
the Administrator of the Estate of Frances L. Korczak and
Babe Doe Korczak,

and

FAIZEL SEDEMAN, a/k/a FAIZEL FEDEMAN,
THERMAL SOLUTIONS, INC., CRC-EVANS
PIPELINE INT'L, INC., AND PIPELINE
INDUCTION HEAT LTD.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the final order vacating the judgment inflict upon Petitioner, Tarkwin Enrick, a sufficiently tangible injury to give him standing under Article III of the Constitution for his appeal.

Does Judge Hibbler's criticism of the judgment on the jury verdict create a special circumstance which would counsel against the application of offensive collateral estoppel and which would render preclusion inappropriate or unfair.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at Kevin Korczak et al. v. Faizel Sedeman et al., Appeal of Tarkwin Enrick, no. 05-2698 and is reprinted in Appendix A to the Petition.

The District Court final order entered on June 3, 2005, approving the settlement agreement and vacating the judgment is unreported.

JURISDICTION

The Court of Appeals entered its decision on October 5, 2005. This Court had jurisdiction under 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

This case involved provisions of Fed R. Civ. P. 24(b)(2) for Permissive intervention.

when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention

will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT

The underlying action arose from an automobile accident which occurred on November 11, 2001 involving two vehicles, one driven by the Plaintiff, Kevin M. Korczak, and the other driven by the Defendant, Faizel Sedeman. The intervenor, Tarkwin Enrick, was a passenger in the vehicle operated by the Defendant, Faizel Sedeman. Korczak filed a lawsuit under case no. 01C9739 before the Honorable Judge Hibbler alleging that the accident was Sedeman's fault.

As a result of their injuries sustained in the accident, Faizel Sedeman and Tarkwin Enrick filed a lawsuit against Kevin Korczak in the Northern District of Illinois, Eastern Division under case no. 03C7899, before Judge Gotschall. Faizel Sedeman and Tarkwin Enrick previously filed before Judge Hibbler a Motion to Consolidate their lawsuit (case no. 03C7899) with Korczak (case no. 01C9739) and it was denied.

Judge Gotschall dismissed the lawsuit (case no. 03C7899) filed by Sedeman and Enrick for lack of diversity jurisdiction. Pursuant to the applicable Illinois law, Sedeman and Enrick refiled their action in state court with a jury demand and their state action is pending in Will County, Illinois.

The Korczak action proceeded to trial and the jury verdict was rendered. The jury found that the Defendant, Faizel Sedeman, was 55% at fault and the Plaintiff, Kevin M. Korczak, was 45% at fault. Judge

Hibbler entered Judgment on the Jury Verdict on October 22, 2004.

The complaint filed by Korczak in case no. 01C9739 and the complaint filed by Sedeman and Enrick in state court disclosed that both lawsuits arose out of a two vehicle accident that occurred on November 11, 2001 in the township of DuPage in Will County, Illinois. In the first lawsuit, Korczak alleges that the accident was Sedeman's fault; in the second lawsuit pending in state court, Sedeman and his passenger Enrick allege the accident was Korczak's fault.

Subsequent to the entry of the judgment of the jury verdict, Plaintiff, Korczak, and certain defendants filed timely post judgment motions before Judge Hibbler requesting a new trial. During the pendency of the post trial motions, Plaintiff, Korczak, filed a Motion to Approve Settlement Agreement and Vacate Judgment entered on the Verdict and set the matter for a hearing before Judge Hibbler on June 3, 2005. Tarkwin Enrick, filed an Amended Motion to Intervene which was entered and continued to June 3, 2005.

In his amended Motion to Intervene, Enrick requested the judgment to stand to establish the liability of Korczak in his state Court action and relied on the offensive use of collateral estoppel to preclude Korczak from relitigating the issue of his negligence.

Judge Hibbler granted Enrick's Amended Motion to Intervene for the limited purpose to oppose Korczak's Motion to Vacate the Judgment entered on the Jury Verdict.

After oral argument on the Korczak Motion, Judge Hibbler approved the settlement agreement and granted the Motion to Vacate the Judgment entered on the Jury Verdict. During his ruling on the motion, Judge Hibbler recited a list of errors which would support a new trial and further stated that he would be inclined to grant a new trial, if the case had not settled.

The Judgment on the jury verdict found the percentage of negligence attributable solely to the Plaintiff, Kevin Korczak is 45% and it reduced the damages sustained by Kevin Korczak by the percentage of negligence (45%) attributable to him.

The total jury verdict for the Plaintiff, Kevin Korczak, and his two minor children, Randi and Matthew, was in the amount of \$3,709,000.00. After the reduction of the jury verdict for the percentage of negligence attributable to Kevin Korczak, the total jury award for Korczak and his two minor children was in the amount of \$3,083,950.00.

The settlement agreement which vacated the judgment on the jury verdict provided for a total settlement amount of \$3,100,000.00 payable to Korczak and his two minor children. The jury award in the amount of \$3,083,950.00 and settlement amount are almost identical.

Specifically the jury awarded \$1,000,000.00 to each minor child for the loss of their mother and \$50,000.00 for each minor child for the loss of their unborn sibling. The total jury award for the two minor children is in the amount of \$2,100,000.00. After reduction for attorney's fees and pro-rata costs, the

jury award to the minor children is in the amount of \$1,356,030.00.

In addition to the jury award to the minor children for the loss of their mother, the Illinois Survival Action provides a damage award for the medical expenses and pain and suffering sustained by the decedent, Frances L. Korczak. The jury awarded the amount of \$220,000.00 for the survival action for Frances L. Korczak. If she died intestate, under Illinois law her minor children are entitled to 50% of the jury award. The jury award for the minor children under the Illinois survival action would be in the amount of \$110,000.00. After the reduction for attorney's fees and costs, the minor children would then receive an additional amount of \$71,042.00.

The settlement agreement approved by Judge Hibbler provided for a structured settlement for both minor children. The cost of the structured annuity for each minor child is in the amount of \$600,000.00. After the payment of attorney's fees and costs, the settlement agreement provides the amount of \$1,200,00.00 for both minor children.

The settlement agreement substantially reduces the amount of money the jury awarded for each of the two minor children. The post judgment motions for a new trial and the discussion by Judge Hibbler in open court about the "fairness" of the jury verdict never mentioned the damage award to the two minor children. The settlement agreement purportedly was to correct the inequities of the jury award.

If, in fact, the jury apportionment of 45% was "unfair", the settlement agreement should have provided for more gross dollars to offset the jury's reduction of Korczak's award due to his comparative negligence. Instead, the settlement agreement takes away a substantial amount of money from the minor children to increase Korczak's jury award.

Tarkwin Enrick, as an intervenor, has no standing to challenge the settlement agreement. He can only oppose the motion to vacate the judgment on the jury verdict. But, if the jury verdict stands, it would have nullified the terms of the settlement agreement.

In his Amended Motion to Intervene, Tarkwin Enrick, states that collateral estoppel applies when four conditions are met: (1) the issue to be precluded is the same as the issue in the prior case; (2) the issue must have actually been decided; (3) the decision on the issue must have been necessary to the court's judgment; and (4) and the party against whom the estoppel is asserted must have been fully represented in the prior litigation. *Meyer v. Ridgon*, 36 F. 3d 1375, 1379 (7th Cir 1994). *Chicago Trust Drivers, Helpers & Warehouse Union (indep.) Pension Fund v. Century Motion Freight, Inc.*, 125 F. 3d. 526, 530 (7th Cir. 1997).

Judge Hibbler agreed that all four conditions for collateral estoppel are met and granted Tarkwin Enrick's Amended Motion to Intervene. Tarkwin Enrick, as a party, filed a Notice of Appeal on June 3, 2005, of the final order vacating the judgment entered on October 24, 2004. The Seventh Circuit dismissed the

appeal because Enrick did not establish standing to pursue this appeal.

REASONS FOR GRANTING THE PETITION

Judge Posner in his opinion had concerns about whether recognizing standing in such a case would make it even more difficult that it is to settle cases, by making the intervenor in effect another party to the settlement negotiations. (5a). The Petitioner, Tarkwin Enrick, respectfully disagrees with this contention because his opposition as an intervenor to the "settlement negotiations" could have prevented the implementation of a settlement agreement which was not in the best interest of the minor children.

The Seventh Circuit stated that a party has a right to appeal from a judgment that inflicts a sufficiently tangible injury on him to give him standing under Article III of the Constitution to sue. (3a). The Court concluded Tarkwin Enrick would receive no benefit from the loss of the preclusive effect of the judgment. (8a).

The Ninth Circuit has held that a third party who relies on the preclusive effect of a judgment for offensive collateral estoppel has standing to challenge the decision to vacate the judgment. *American Games Inc. v. Trade Produces, Inc.*, 142 F. 3d. 1164, 1167 (9th Cir. 1998).

"American Games stands to benefit directly from the preclusive effect of the district court's decision on those issues if that court's vacatur decision is reversed. The actual or threatened

injury to American Games is the loss of the preclusive force of the district court's decision. That loss is traceable to the district court's vacatur order, and is redressable by favorable action on appeal should this court decide to reverse that vacatur order, restoring the decision. Thus, American Games satisfies the constitutionally required minima for standing in an Article III court." (emphasis added.) Id.

The Seventh Circuit had doubts about the soundness of the Ninth Circuit's decision in *American Games* but concluded that it need not decide to resolve whether the *American Games* decision is wrong in order to deny standing to Tarkwin Enrick on his appeal. (5a). In effect, the Seventh Circuit reasoning to deny standing to Tarkwin Enrick is inconsistent with the decision of the Ninth Circuit in *American Games*. The Seventh Circuit attempts to distinguish the facts in *American Games* from the facts in Tarkwin Enrick's appeal because his case is "peculiar" due to Judge Hibbler's comment in open court that the judgment was unsound. (7a).

To accomplish its objective to distinguish the Ninth Circuit decision in *American Games*, the Seventh Circuit cites the case of *Crowder v. Lash*, 687 F. 2d 996 (7th Cir. 1982) for the proposition that the judgment entered by Judge Hibbler should not be given collateral estoppel effect if "any special circumstances exist which would render preclusion inappropriate or unfair". (7a). The Seventh Circuit argues that Judge Hibbler's criticisms of the judgment would have dissuaded the judge in the second law suit from giving the judgment collateral estoppel effect.